IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-562

ROSEBUD SIOUX TRIBE,

Petitioner,

v.

HONORABLE RICHARD KNEIP, ET AL.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

[Appendix in Separate Volume]

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October, 1975

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[Appendix in Separate Volume]

The Rosebud Sioux Indian Tribe of South Dakota petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*) is not yet reported. The opinion of the district court

reported in 375 F.Supp. 1065, is set out in Appendix B, *infra*. (All appendices are in a separate volume.)

JURISDICTION

The judgment of the court of appeals was entered on July 16, 1975. App. B, p. 114, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the reservation status of three-fourths of the Rosebud Indian Reservation was terminated by three statutes enacted in 1904, 1907 and 1910 under which Congress, unilaterally, and without the consent of the Tribe, directed the sale of unallotted tribal reservation land to settlers with the proceeds to be credited to the Tribe, and at the same time affirmatively declared that the United States was not purchasing the land and was not guaranteeing to find purchasers, but was acting only as a trustee in the disposition of the lands and to expend and pay over the proceeds to the Tribe, as received.

STATUTES INVOLVED

The statutes involved are the Acts of April 23, 1904, c. 1484, 33 Stat. 254; March 2, 1907, c. 2536, 34 Stat. 1230; and May 30, 1910, c. 260, 36 Stat. 448, respectively. The full texts of the three statutes are set out in Appendices C-1, C-2 and C-3, *infra*, respectively.

STATEMENT

In each of three statutes, adopted in 1904, 1907 and 1910, the United States, without the consent of the Tribe, unilaterally opened unallotted tribal land on the Rosebud Indian reservation for sale to settlers, with the

proceeds of sale to be credited to the Tribe, as received. In the last section of each statute, the United States affirmatively declared that it was not purchasing the land, and that it was not guaranteeing to find purchasers. (Appendices C-1, -2, -3, *infra*.) The court of appeals construed the three statutes to extinguish Indian title, to restore the land to the public domain and to terminate the reservation status of about three-fourths of the reservation. The Tribe's position is that the decision below is in contravention of the controlling principles established in *DeCoteau v. State County Court*, 420 U.S. 425 (1975). *Mattz v. Arnett*, 412 U.S. 481 (1973) and *Seymour v. Superintendent*, 368 U.S. 351 (1962).

The Rosebud Sioux Tribe of South Dakota is an important Indian tribe with a current enrollment of 9400 members and an on-reservation population of 7181 Indians. (App. D, p. 129.) The Tribe never has sold a single acre of reservation land to the United States. The reservation area has been Sioux country since before the Louisiana Purchase. The area never has been public land of the United States. Consistently through the years, the Tribe has claimed and exercised jurisdiction over Indians on the reservation areas in suit, and Indians on these areas have regarded themselves as subject to the jurisdiction of the Tribe. Since 1868, the Bureau of Indian Affairs has administered the areas as part of the Rosebud reservation.

The Rosebud Sioux are Indians of the Sioux Nation. As early as 1851, the United States recognized the Sioux Nation as the owner of a vast domain of over 60 million acres in North Dakota, South Dakota, Nebraska, Montana and Wyoming, *Sioux Tribe v. United States*, 205 Ct. Cl. 148, 500 F.2d 458, 460 (1974). Article 2 of an 1868 Treaty "set apart for the absolute and undisturbed use and occupation" of the Sioux, the Great Sioux Reserva-

tion, embracing about 25 million acres of Sioux land west of the Missouri River in South Dakota. Treaty of April 29, 1868, 15 Stat. 635. The same article guaranteed that no one, except authorized Federal personnel "shall ever be permitted to pass over, settle upon, or reside" on the reservation. Article 12 of the treaty promised that no sale of any part of the Great Sioux Reservation would be "of any validity" without the written consent of three-fourths of the male adults. None of those promises was kept.

In 1877, the United States, without Sioux consent, unilaterally acquired about 7.5 million acres of the Black Hills portion of the reservation, highly prized for its gold.[1] Under an 1889 Act, assented to by three-fourths of the male adults, one-half of the remainder of the Great Sioux Reservation was "restored to the public domain" (sec. 21) and the balance was divided into six reservations, each defined by boundaries (secs. 1-6). Act of March 2, 1889, c. 405, 25 Stat. 888.[2] Provision was made for allotments on each reservation (secs. 8-11). Section 19 of the 1889 Act extended to the six reservations all of the provisions of the 1868 Treaty, not in conflict with

[1]Act of February 28, 1877, 19 Stat. 254; *Sioux Nation of Indians v. United States*, 33 Ind. Cl. Comm. 151, 157 (1974); also *Sioux Tribe v. United States*, 97 Ct. Cl. 613, Fdgs. 2, 3, 4, pp. 619-627, (1942) cert. denied 318 U.S. 789. Held to be a Fifth Amendment taking in *Sioux Nation v. United States*, 33 Ind. Cl. Comm. 151 (1974), reversed on grounds of res judicata, *United States v. Sioux Nation*, Appeal No. 16-74, __Ct.Cl.__, petition for certiorari filed September 22, 1975, Docket No. 456.

[2]Section 28, of the 1889 Act provided that the Act take effect only upon assent by the three-fourths majority as required by the 1868 Treaty. Pursuant to section 28, the President proclaimed that the requisite consent had been obtained. Proclamation of February 10, 1890 (26 Stat. 1554).

the 1889 Act, including the promise of "absolute and undisturbed use and occupancy," the promise that outsiders would be barred, and the promise that no reservation land would be sold without the written consent of three-fourths of the male adults. The boundaries of Rosebud, one of the six reserves, were delimited and the area "set apart for a permanent reservation for the Indians receiving rations and annuities at the Rosebud Agency" (sec. 2). The reservation area embraced all of what later became Todd, Mellette and Tripp counties, and about three-fourths of Gregory County.

The three Rosebud statutes in suit are termed "surplus" land statutes because the Government deemed land not immediately required for allotment to be surplus to the ~~Government~~ Tribe's needs. Commencing in the 1880's, Congress enacted a number of surplus land statutes opening unallotted tribal land for sale to settlers with the proceeds credited to the landowning tribe, as received by the Government.[3] Those statutes, quite uniformly made Indian consent a prerequisite to statutory validity. On January 5, 1903, this Court held that a statute ratifying an outright sale for a flat consideration was within the authority conferred on Congress by the Constitution,

[3]For example: Acts of June 15, 1880, c. 223, sec. 10, 21 Stat. 199 (Utes); August 7, 1882, c. 434, sec. 1, 22 Stat. 341 (Omaha); March 3, 1885, c. 319, sec. 5, 23 Stat. 340 (Umatilla); March 3, 1885, c. 337, sec. 1, 23 Stat. 351 (Sac and Fox); July 4, 1888, c. 519, sec. 2, 25 Stat. 240 (Winnebago); January 14, 1889, c. 24, sec. 1, 25 Stat. 642 (Chippewa) construed in *Minnesota v. Hitchcock*, 185 U.S. 373, 394-395 (1902); Act of August 15, 1894, c. 290, 28 Stat. 286, 296-7 (Sac and Fox); *idem*, 28 Stat. 332 (Yuma); June 10, 1896, c. 398, sec. 10, 29 Stat. 358 (San Carlos); May 27, 1902, c. 888, 32 Stat. 263 (Uintah and Ouray). A notable exception where no consent was obtained is the Klamath Act of June 17, 1892, c. 120, 27 Stat. 52, held not to disestablish the reservation in *Mattz v. Arnett*, 412 U.S. 481 (1973).

even without Indian consent by the three-fourths majority required by an earlier treaty. *Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903).

Commencing in 1904, after *Lone Wolf* established that tribal consent was not necessary, Congress enacted at least 21 "surplus" land statutes, affecting 19 different reservations. None of the tribes consented to any of the 21 statutes, except for the Crow 1904 Act and the Wind River 1905 Act. (App. D, Items 5, 8, p. 129, *infra.*) Each of the 21 statutes proclaimed affirmatively that the United States was not a purchaser and did not guarantee to find purchasers. In no instance did the tribe sell and the United States buy or pay for the land, except for school sections 16 and 36 donated to the State. In none of the 21 instances did the land become public land of the United States.

The history of the three Rosebud surplus land statutes starts in 1901, before *Lone Wolf, supra,* when Inspector McLaughlin, the Government's most experienced and successful bargainer with Indians,[4] was dispatched to

[4]McLaughlin was employed in the Indian Service for 40 years (1871-1910). He negotiated 13 of the 21 surplus land acts, including all three with Rosebud. (App. D, p. 129, Items 1,2,4,6,8,9,10,13,15,16,18,19,21.) He negotiated many other agreements, including an earlier one of March 10, 1898 in which the Rosebud Indians were induced to consent to the presence of the Lower Brule, who had been moved onto the Rosebud reservation. Act of March 3, 1899, c. 450, 30 Stat. 1362, 1364. McLaughlin spoke Sioux and was particularly valuable to the Government in negotiations with the Sioux because he had married into the Sioux tribe. See, Council proceedings, December 15, 1906: "Ralph Eagle Feather: * * * Now, my friend, we respect you a good deal because you belong to the tribe, married into our nation, that is the reason we respect you a good deal. You know that. * * *." (App. E, Item 5, p. 134.) McLaughlin, *My Friend the Indian,* p. 297. (Houghton Mifflin Company 1910) (L.C. E77 M162.) Also S. Rept. 887, 60th Cong., 2d sess., p. 3 (1909), R. App. III, p. 290.

negotiate an agreement with the Rosebud Indians for the outright sale of 416,000 acres in the Gregory county portion of the reservation as delimited in section 2 of the 1889 Act, *supra.* When McLaughlin came to Rosebud in 1901, there were 4917 Sioux on the reservation, some 4508 allotments had been made pursuant to sections 8-11 of the 1889 Act, of which 452 allotments were in the Gregory county portion of the reservation. (Report of Commissioner of Indian Affairs, 1901, pp. 371, 372; H.Rept. 954, 57th Cong., 1st sess., p. 1 (1902); App. II, p. 40, record below, hereinafter cited "R.App.___, p.___.")[5] McLaughlin succeeded in obtaining an agreement in 1901 under which the Rosebud Sioux did "cede, surrender, grant and convey * * * all their claim, right, title, and interest in and to all that part of the Rosebud Indian Reservation now remaining unallotted, situated * * * in Gregory County" for the flat sum of $1,040,000. Three fourths of the male adults consented. (App. C-1, pp. 116-117.) The final article of the 1901 agreement called for ratification by Congress. (App. C-1, p. 116.)

In 1902 bills were introduced to ratify the sale. The bill as reported to the Senate, in addition to ratifying the agreement, provided for free homesteads and the donation of school sections to South Dakota. S. Rept. 662, 57th Cong., 1st sess., pp. 1-2 (1902); R. App. II, p. 37. The bill (S. 2992) was passed in the Senate after stiff opposition on the ground that public funds ought not be used to purchase Indian land and then give the land away to homesteaders. (App. A, pp. 16-19, *infra.*) On the

[5]Copies of most of the legislative and other materials referred to by the court below appear in Appendices I, II, III, IV transmitted to the Court pursuant to Rule 21(1) by letter of October 2, 1975 to the Clerk.

House side, the committee rejected the Senate provisions for free homesteads as well as for the donation of school sections. H.Rept. 2099, 57th Cong., 1st sess., p. 1 (1902); R. App. II, p. 44.

To overcome the opposition, new bills were introduced and reported out in 1903. Although referred to as a "new policy" (App. A, p. 19), the new bills followed the premise of the earlier surplus land statutes, enacted commencing in the 1880's, where the land was opened and the proceeds credited to the Tribe. (See fn. 3, p. 5, *supra.*) The preambles of the new bills embodied the 1901 agreement exactly as approved by the Rosebud Tribe. Then came the enactment clause preceding section 1 which "ratified" the "agreement" after first making broad substantive changes that converted the transaction from an outright sale for a sum certain, into a "surplus" land statute arrangement, whereby the uncertain future proceeds of settlers' purchases were to be expended for the benefit of the Tribe, as received. The bills called for Indian consent to the new "surplus" land arrangement. (S. 7390; H.R. 17467; S. Rept. 3271, 57th Cong., 2d sess., p. 2 (1903), adopting H. Rept. 3839, 57th Cong., 2d sess. (1903); R. App. II, p. 57. The Senate passed S. 7390 but the House did not act. (App. A, p. 19, fn. 27.)

To obtain consent to the new form of agreement, Inspector McLaughlin was dispatched to Rosebud in the summer of 1903 "for the purpose of negotiating a new agreement * * * along the lines proposed in Senate Bill No. 7390". (App. A, p. 20, fn. 28.) Despite extended councils on six days in July and August 1903, McLaughlin failed to get the requisite three-fourths consent.[6]

[6]Minutes of councils held at Rosebud July 24, 29, 30, August 7, 8, 10, 1903. R. App. II, pp. 70-126, in the court below. Some

[footnote continued]

Hollow Horn Bear, a principal spokesman, perhaps best expressed the thinking of the Indians when he said that if the United States had regard for the treaty requirement of consent by a three-fourths majority, "they should not open that Gregory County without our consent. If they do, I shall feel like a prisoner in my own country." (App. E, Item 1, p. 131.) Nevertheless, after the new session of Congress opened in 1904, a fresh bill, omitting the requirement of tribal consent, was promptly reported out of committee in January and February 1904 and became law on April 23, 1904.[7] Five "surplus" land acts became law that same month, within a few days of each other. (See App. D, Items 2-6, p. 129.)

In December 1906, less than three years after the 1904 Act, bills were introduced to open the Tripp county portion of the reservation. The bills were held in abeyance while McLaughlin was sent to Rosebud to obtain the Indians, consent. (App. A, p. 34, fn. 55; p. 35, fn. 57.) When McLaughlin came to Rosebud in 1906, there were 5021 Indians on the reservation. (Report, Commissioner of Indian Affairs, 1906, p. 483.) About 187,000 acres in Tripp county already had been allotted. (App. E, Item 3, p. 133.)[8] McLaughlin was reminded that

excerpts are in Appendix E, *infra.* McLaughlin obtained 90 signatures in open council and solicited 647 more by touring the reservation for 16 days and holding meetings in nine of the reservation districts. He still fell 296 short of the required three-fourths majority. App. E, Item 2, p. 132.

[7]The legislative history of H.R. 10418, appears in H. Rept. 443, 58th Cong., 2d sess., January 21, 1904; House debates, 38 Cong. Rec. 1421-29, January 30, 1904; S. Rept. 651, 58th Cong., 2d sess., February 4, 1904; 38 Cong. Rec. 4984-88 (April 18, 1904).

[8]Based on an average of 160 acres per allotment, this meant over 1100 allotments. Following the 1907 Act a large number of additional allotments were made in Tripp county. As late as June

[footnote continued]

the 1868 Treaty required a three-fourths majority. At the same time he was instructed to tell the Indians "with great particularity" that under the decision in *Lone Wolf*, their consent was not necessary, but that it was the Department's desire "to obtain from them their views of the terms on which the opening ought to be made; and that it will doubtless be to their advantage to enter into an agreement * * *." (App. E, Item 4, p. 133, R. App. II, p. 166.)

McLaughlin held councils with the Indians in the deep of winter on four days in December 1906 and three in January 1907. (App. A, p. 35, fn. 58.) The Indians submitted their wishes in writing (App. A, p. 35; App. E, Item 8, p. 135.) The Indians complained that the 1901 agreement had not been fulfilled, that the agreed consideration of $1,040,000 had not been paid,[9] that the receipts from settlers were too uncertain and already had resulted in cattle losses, (App. E, Item 10, pp. 135-136) and that the bill made no provision for allotments to all unallotted children born since 1889, for new allotments to the 80 or so Indians who had refused allotments of poor quality land and for processing the pending backlog of 600 or 700 allotments. (App. E, Items 6, 10, 12, 14,

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30, 1925, the General Accounting Office reported that of the 1,083,680.11 acres affected by the 1907 Act, over 37% (406,081.75 acres) were in Indian allotments. (App. E, p. 142, *infra.*)

[9]Appendix E, Item 10, p. 135: Hollow Horn Bear (a principal spokesman, App. E, Item 9, p. 135): "* * * I want $5 per acre for the entire tract and I want the Great Father to pay for it. I want the Great Father's council to pay for this land at $5 per acre straight, *to guarantee it. * * * I want the money to be placed in the U.S. Treasury* the same as former treaties were made." (emphasis supplied) The entire transcript of the council proceedings is in R. App. III, pp. 176-269.

15, pp. 134-138.) McLaughlin promised "positively" that the demand for allotments would be met. (App. E, Items 6, 12, 14, pp. 134, 136, 137.) The Indians asked that the bill provide for 5% interest on their money in the Treasury (*idem*, Item 13, pp. 136-137) and higher prices for the land. (App. A, p. 35.) In particular, the Indians saw no reason why the United States should pay $2.50 per acre, instead of the fair value of the school sections the Government was buying for donation to the State. (*Idem*, Items 13, 14, 15, pp. 136-138.)

At the negotiations McLaughlin repeatedly voiced thinly disguished *Lone Wolf* threats,—i.e., it would be better for the Indians to agree because if they did not agree, Congress could and would open the land anyhow. (App. E, Items 11, 16, 17 pp. 136, 138-139 *infra.*) In any event McLaughlin prepared an agreement. (The agreement appears in H. Rept. 7613, 59th Cong., 2d sess. pp. 5-8 (1907) R. App. III, pp. 279-281.) In open council, McLaughlin obtained only 43 signatures (thumb prints). He then toured the reservation as he had done with the 1904 Act, and solicited additional signatures. With all that, he still fell 321 signatures short of the requisite three-fourths majority. (App. E, Item 19, p. 139; H. Rept. 7613, *supra*, p. 7 showing 705 of 1368 qualified Indians signed.)

Even though there was no agreement, the Secretary of the Interior, recommended a simple ratification bill embodying the "agreement". (App. A, p. 36, fn. 65.) The House disregarded both the recommendation and the "agreement" and passed the unilateral "surplus" land statute that became the Act of March 2, 1907. On the floor of the House, the manager of the bill, the Congressman from South Dakota, gave the House the erroneous understanding that the Indians had con-

sented.[10] The Senate adopted the House report and passed the bill without debate. The Senate version provided for interest at 5% on the first million dollars in proceeds, the House version 3%. In conference, the House prevailed and the 3% version became law. (App. A, pp. 36-37.)

In 1908, less than two years after the 1907 Act, a "surplus" land bill was introduced in the Senate to authorize the sale and disposition of the unallotted land in the Mellette County portion of the reservation. (App. A, p. 45, fn. 89; S. 7379, 60th Cong., 2d sess.) The Secretary of the Interior recognizing that under *Lone Wolf* the consent of the Indians was not necessary, recommended that at least "the views of the Indians should be procured before the bill is finally acted on, * * *." S.Rept.887, 60th Cong., 2d sess., p. 3 (1909), R. App. III, p. 288. The Senate Committee disregarded the recommendation because "it would delay the consideration of the matter unduly if action were withheld for that purpose [consultation with Indians]." *Idem*, p. 2. When the Senate failed to consider the bill (App. A, p. 45, fn. 91), Inspector McLaughlin was ordered to the field, not to obtain the consent of the Indians, but "to take up with the Indians of the Pine Ridge and Rosebud Reservations the matter of opening parts of these reservations to settlement * * *." (App. E, Item 20, p. 140; R. App. III, p. 292.)

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[10] 41 Cong. Rec. 3104, App. III, p. 3104; "* * * The bill is substantially in accordance with an agreement which has just been made with the Indians, signed by forty-two more than a majority of the male Indians over the age of 18 years. * * *.

"The Indians, as I have stated before, have agreed to the disposition of it [land] under the terms of the bill."

The House was misled. Of course, the requisite three-fourths majority required by the 1868 Treaty had not been obtained.

In 1909, when McLaughlin went to Rosebud, there were about 5060 Indians on the Rosebud reservation. (Report of the Commissioner of Indian Affairs, 1909, p. 148.) The Mellette county portion of the reservation contained 837,125 acres. Of this acreage, as late as 1925, over 60% (514,509 acres) was still allotted. (App. E, Item 27, pp. 143-144, R. App. IV, pp. 471-2.) McLaughlin held three councils at Rosebud in March and April 1909. (App. A, p. 45, fns. 92, 93, R. App. III, pp. 293-328.) He told the Indians, "I am here * * * to present to you the question of opening to settlement the surplus lands of a certain part of your reservation * * *." (App. E, Item 21, p. 140.) He acknowledged the Indians' opposition "to the opening of any more of your reservation." (App. E, Item 22, p. 141) He again employed the *Lone Wolf* threat repeatedly reminding the Indians that Congress had the power to open the lands without Indian consent. (App. E, Items 23 and 24, p. 141.) The Indians refused to be threatened. (App. E, Item 25, p. 142.) They opposed the opening of the reservation. In the next Congress, a new bill was introduced that became the Act of May 30, 1910.[11] Two other surplus land acts were adopted at about the same time. (See App. D, Items 19, 20, p. 129.)

With the adoption of the 1910 Act, the Todd county area was the only portion of the reservation as established by the 1889 Act, not affected by a surplus land act. In 1911 another "surplus" land bill was introduced affecting Todd county. McLaughlin again was sent to Rosebud. The bill was reported out and passed the Senate where it

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[11] This time, during the debates, the Senate was misled into believing that the Indians had consented. Senator Gamble of South Dakota stated (App. A, p. 49): "The Indians themselves agreed to the provisions of this bill after it had been submitted to them for their consideration."

died. S. Rept. 1166, 62d Cong., 3d sess. (1913); 49 Cong. Rec. 3, 4210; R. App. III, p. 396. Otherwise, according to the decision below, there would be no Rosebud reservation.

The Tribe brought this suit charging that State authorities were exercising jurisdiction over Indians on those portions of the reservation affected by the three surplus land acts and asking for judgment declaring, in effect, that the three statutes did not disestablish any part of the Rosebud reservation as bounded by the 1889 Act. The district court entered judgment that the three statutes "did extinguish the reservation or 'Indian land' nature of the unallotted surplus lands in said counties by returning them to the public domain, and did diminish the geographical location of the boundaries of the Rosebud Sioux Reservation to coincide with the boundaries of Todd County, South Dakota [the only area not affected by a surplus land statute]." (App. B. p. 114.) The court of appeals affirmed that judgment. (App. A, p. 61.)

The court of appeals recognized that the 1901 "agreement" (pp. 15-16, *supra*), contemplated an outright cession and sale for a sum certain with the Tribe's consent by a three-fourths majority. The Tribe conceded, even before *DeCoteau*, that if Congress had ratified the 1901 agreement, Indian title would have been extinguished. (App. A, p. 16.) The court ruled that the 1904 Act ratified the 1901 agreement, amended "solely with respect to the method of payment". (App. A, p. 23.) On that basis the court construed the 1904 Act to be a "cession of the County of Gregory" (App. A, p. 26) and held that the language of cession in the unapproved 1901 agreement "ceded, granted and conveyed" the Gregory County land to the United States. (*Idem*, p. 28, fn. 45; also, pp. 30-31.)

Essentially, to determine the intent of Congress in the 1904 Act, the court below relied on various pre-1904-Act statements made in the context of the voluntary, outright cession for $1,040,000, ultimately incorporated into the 1901 agreement, and on the language of the unratified 1901 Agreement itself.[12] (App. A, pp. 11-27, *passim*.) The court failed to realize that the 1904 Act, far from ratifying the 1901 "agreement", unilaterally converted that "agreement" into a surplus land statute arrangement. For that reason, pre-1904-Act statements can have no bearing on the Congressional intent expressed by the *language* of conversion in the 1904 Act. To put it another way, in the search for Congressional intent, the court below, for all practical purposes, ignored the *language* of the statute and relied on views, expressions of opinion, and erroneous statements of law all derived from extraneous material.

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[12]App. A, pp. 25-26: "The 1904 Act, incorporating the entire text of the 1901 agreement (save for the lump sum provision) was obviously an outgrowth of and a continuation of the objectives of the 1901 Agreement. The terminology employed, language of diminution and extinguishment, was used interchangeably with respect both to the proposed ratification of the 1901 Agreement and the passage of the 1904 Act."

The statement can be misleading. The 1901 Agreement is not part of the operating sections of the statute. The preamble of the 1904 Act, preceding the enactment clause, incorporated the entire text of the 1901 agreement leaving nothing out. App. C-1, pp. 115-116. But section 1 of the Act, following the enactment clause, sets out the 1901 "agreement" "as herein amended and modified." What follows is not the agreement subscribed to by the Indians. Much is omitted—a good deal more than the "lump sum provision" for payment. A major omission was the requirement for Indian consent specified in Article VI of the Agreement. Other omissions of a strong substantive nature are discussed at pp. 21-22 *infra*.

The court of appeals extended its erroneous premise that the 1904 Act extinguished Indian title and terminated the reservation status, to the 1907 and 1910 Acts. The court considered that the 1907 Act, like the 1904 Act, and unlike the 1910 Act, was the product of "formal negotiations and agreement with the Rosebud Indians." (App. A, p. 44.) True, there was a 1907 instrument signed by less than a three-fourths majority (pp. 8-9 supra). That instrument was not a contract binding on the Tribe. But, even if the 1907 "agreement" had been binding, which it was not for lack of a three-fourths majority, the 1907 Act did not ratify the agreement, or make any mention of it. (App. C-2, p. 121.)

Nevertheless, the court below equated the 1907 Act with its concept of the 1904 Act saying "[T]he 1907 Act is, in substance, identical to the 1904 Act: * * *" (App. A, p. 38) and that the 1907 Act simply expressed the same continuity of purpose that the court below had found in the pre-1904-Act materials related to the voluntary, outright sale for $1,040,000 expressed in the 1901 Agreement (*idem*, pp. 38-40). The court said (App. A, p. 40): "We need simply note that the 1907 Agreement is similar in form to the 1901 Agreement, was negotiated between the same parties, and contains similar language of cession." Form, parties and language are irrelevant. What is relevant is that the instrument was ineffective for lack of a three-fourths majority, and Congress never ratified it. On this the court is silent.

As to the 1910 Act, the court below agreed that there were no "formal negotiations and agreement with the Rosebud Indians." (App. A, p. 44.) Even so, the court fitted the 1910 Act into the same cast it had provided for the 1904 and 1907 Acts. The court observed that

"[T]he 1910 Act is substantially similar to the 1907 Act. Its operative language is identical * * *." (*Idem*, p. 46.) Having already decided that in the 1904 and 1907 Acts Congress had determined to alter the reservation boundaries, the court could "find nothing in the language of the 1910 Act or in the surrounding circumstances and legislative history which indicates a change in that congressional determination to alter the reservation boundaries *which we have found in the 1904 and 1907 Acts.*" (*Idem*, p. 48.) (emphasis supplied.)

REASONS FOR GRANTING THE WRIT

1. The decision of the court of appeals is of broad general importance in Indian law. The district court recognized that its decision would have "great political, social, cultural and economic effects." (App. B, p. 112.) Even if confined to those "surplus" land statutes enacted in 1904 and therafter, without regard to the earlier statutes (see p. 5, fn. 3, *supra*), the decision below will open the way to destroy the reservation status of all,[13] or parts, of at least 17 Indian reservations with an Indian population in excess of 69,000. (App. D, p. 129.) There are at least eight such reservations in the Eighth Circuit. (App. D, p. 129, Items 1, 2, 4, 10, 15, 16, 18, 20.) All "surplus" land reservations predate the creation of the State in which they are located. We believe all have been and now are administered by the United States as Indian reservations. The decision below would have a revolutionary impact on reservation life. Tribal government

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[13] The surplus land statutes of 1908 and 1913 between them cover all of the Standing Rock Sioux Reservation in North Dakota and South Dakota (App. D, p. 129, Items 16 and 21), and the surplus land statute of 1908 affects all of the Fort Peck Indian Reservation in Montana (*idem*, Item 17).

would be virtually destroyed. Indians would be subjected to all aspects of State law and at the mercy of State law and order. They no longer would possess "the power of regulating their internal and social relations * * *." *United States v. Kagama*, 118 U.S. 375, 381-382 (1886), quoted in *United States v. Mazurie*, 419 U.S. 544, 557 (1975)

The people of South Dakota have rejected prior efforts of the State legislature to extend State jurisdiction over reservation Indians.[14] On the west side of the State, where most of the reservations are located, an organization called "Civil Liberties for South Dakota Citizens" recently has been formed that opposses Indian efforts to assert their treaty and reservation rights. The prognosis is not good for the public peace. Indians regard and call this organization the "Indian Klu Klux Klan." Unless set aside, the decision below will wipe out traditional procedures and Indian self-government and will have far ranging effect on the lives of tens of thousands of reservation Indians, over 7,000 at Rosebud, and more than 20,000 on the other four reservations in South Dakota affected by surplus land statutes (Standing Rock, Cheyenne River, Pine Ridge and Lower Brule) as well as the Indians on reservations in other states, affected by surplus land statutes. (App. D, p. 129.)

The same district court that rendered the decision in this case has since held that the 1910 surplus act affecting

[14]For 15 years Congress offered South Dakota the opportunity to accept State jurisdiction over Indians on the reservation without Indian consent. The people of the State, by referendum, overwhelmingly rejected the 1961 attempt of the South Dakota legislature to take over such jurisdiction in 1961 (Session Laws 1961, Ch. 464). See *United States ex rel Condon v. Erickson*, 478 F.2d 684, 685, fn. 1 (1973).

the Pine Ridge reservation, adopted three days before the Rosebud act, terminated the Bennett County portion of the Pine Ridge reservation. (App. D, p. 129, Item 18.) The appeal is now under submission in the court below. (*Cook v. Parkinson*, No. 75-1306.) Before the *Rosebud* decision below, the Supreme Court of South Dakota, relying on *Seymour v. Superintendent*, 368 U.S. 351 (1962), held that the 1913 surplus act (App. D, p. 129, Item 21) did not terminate the east half of the Standing Rock Sioux reservation. *State v. Molash*, 86 S.D. 558, 199 N.W.2d 591 (1972). Recently, the Supreme Court of South Dakota has signaled that in view of the *Rosebud* holding below, its 1972 decision in *Molash* was wrong. *State of South Dakota v. Whitehorse*, No. 11319-a-JMD (August 1, 1975). (See App. E, Item 28, pp. 145-146 for the pertinent excerpt.)

2. This is the first case in which any Federal appellate court has held that a "surplus" land statute disestablished a reservation. Whenever the question has been presented, this Court has held that surplus land statutes do not operate to terminate the reservation status,[15] do not extinguish trust title and do not convert the tribal trust land into public land of the United States.[16] Prior to this case the same was true of the court below[17] and still is

[15]*Mattz v. Arnett*, 412 U.S. 481 (1973); *Seymour v. Superintendent*, 368 U.S. 351 (1962).

[16]*Ash Sheep Co. v. United States*, 252 U.S. 159 (1920); *United States v. Mille Lac Band of Chippewa Indians*, 229 U.S. 498 (1913); *Minnesota v. Hitchcock*, 185 U.S. 373, 393-395 (1902); *United States v. Brindle*, 110 U.S. 688, 693 (1884).

[17]*City of New Town, North Dakota v. United States*, 454 F.2d 121 (1972); *United States ex rel Condon v. Erickson*, 478 F.2d 684 (1973).

true in the Ninth Circuit.[18] The holding below is inconsistent with the decisions of this Court, with the decision of the Ninth Circuit and with the prior decisions of the court below.

3. The decision below is plainly erroneous and inconsistent with this Court's decision in *Seymour v. Superintendent, supra, Mattz v. Arnett, supra,* and the principles reiterated in *DeCoteau v. District County Court, supra.* In *DeCoteau* the Court emphasized (420 U.S. at p. 444): "This Court does not lightly conclude that an Indian reservation has been terminated. * * * The congressional intent [to terminate] must be clear, to overcome 'the general rule that [d]oubtful expressions are to be resolved in favor of the weak and defenseless people who are wards of the nation, dependent upon its protection and good faith.' [citing]. Accordingly, the Court requires that 'congressional determination to terminate * * * be expressed on the face of the Act or be clear from the surrounding circumstances and the legislative history.' "

In *DeCoteau,* although this Court gave the rule of favorable construction of Indian statutes the "broadest possible scope," the Court could not reconcile an intent to continue reservation status with an outright sale and purchase for a sum certain, a sale to which the Indians consented, fully aware that they were giving up their reservation. The Court pointed out that the mere opening of tribal lands to settlement as in *Seymour* and *Mattz,* is not inconsistent with continued reservation status, where, as in the case of all three Rosebud statutes, the statute is a unilateral action by Congress and not the ratification of a previously negotiated agreement to which the tribe

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[18] *United States v. State of Washington,* 496 F.2d 620 (C.A. 9, 1974), certiorari denied 419 U.S. 1032.

consented. *DeCoteau v. District County Court, supra,* pp. 444, 447-448.

Notwithstanding *DeCoteau's* emphatic and careful distinction between a voluntary, outright sale for a sum certain and the "surplus" land statutes in *Mattz* and *Seymour,* the court of appeals undertook to fit this case into the *DeCoteau* cast of an outright sale for a sum certain. To do this, the court in a somewhat ambivalent fashion, held that the 1904 Act ratified an agreement to cede.[19] As noted (pp. 8-9 *supra*), there was no bilateral agreement. The 1901 "agreement," approved by a three-fourths majority of the Indians, by its own terms was ineffective unless ratified by Congress. (App. C-1, Article VI, p. 116.) Congress did not ratify it. (App. A, p. 16.)

To the court below, the *sole* difference between the unratified 1901 Agreement and the unilateral modification in the 1904 Act was the "method of payment." (App. A, p. 23.) This assumes there was a bilateral contract and an agreed payment and that the only change was the method in which that payment was to be made.

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[19] Ambivalent because early in its opinion the court unequivocally states (App. A., p. 16): "The negotiated Agreement, however, was never ratified." Thereafter, the court states, App. A, pp. 22-23: "Within nine months Congress passed a ratification bill [1904 Act] which amended the 1901 Agreement solely with respect to the method of payment"; *idem,* p. 26--statement that the 1904 Act incorporated the entire text of the 1901 Act and that the legislative materials do not show boundaries were to be left undisturbed "despite the *cession* of the County of Gregory" and that the Gregory county portion of the reservation was "*pro tanto* extinguished"; *idem,* p. 28—that under the 1904 Act the Gregory county portion of the reservation "was ceded, granted and conveyed to the United States,* * *"; *idem,* p. 33—that a beneficial interest was retained, presumably in the proceeds of sale, "does not erode the scope and effect of the *cession* made" by the 1904 Act; (emphasis supplied).

The true difference is that the 1901 instrument, if ratified, would have been a voluntary, outright sale for a guaranteed payment of $1,040,000 deposited in the United States Treasury, out of which $250,000 was to be expended as soon as practicable to establish the Indians in live-stock operations, and the balance in five annual expenditures of $158,000 each for per capita payments. As unilaterally modified by the 1904 Act, the 1901 instrument was not a contract, was not a conveyance and guaranteed nothing. Under the 1904 Act, if there had been no settlers, there would have been no money. There are a number of other substantive differences that compel rejection of the notion that a ratified agreement was made. (See App. F, p. 147.)

The court of appeals brought the 1907 Act and the 1910 Act under the cover of the same erroneous premise that the 1904 Act ratified an outright cession, extinguished Indian title and placed the land in the public domain. See pp. 14-15, *supra.* In no instance did the court consider that the language of any of the three statutes was susceptible of more than one meaning, or was as consistent with a conclusion of no termination, as with a conclusion of termination of reservation status. The court quoted, but never invoked, the rule that in construing Indian statutes, doubts should be resolved in favor of the Indians. Indeed, to bolster its conclusion, the court relied on references to language in subsequent unrelated statutes where incidental to the purposes of the statutes, reference is made to land in what was "formerly a part" of the reservation, or the "former Rosebud Indian reservation." (App. A, p. 34, fn. 54; p. 44, fn. 88; p.59, fn. 134.) The court made no mention of subsequent statutes of the same kind called to the court's attention,

where language led to the opposite result.[20] Such subsequent statutes are inconclusive, inconsistent and not a reliable indicator of Congressional intent. *Mattz v. Arnett,* 412 U.S. 481, 505, fn. 25 (1973).

More important, than subsequent statutes, is the complete absence of language in the three Rosebud statutes expressly terminating any part of the reservation or altering the reservation boundaries. Not a word expresses the clear intent essential to wipe out reservation status and leave hundreds of Rosebud Indians outside the reservation boundaries. The court below is silent on this. Nor did the court note that when Congress intended to terminate reservation status, it used clear language to accomplish that end. *Mattz v. Arnett,* 412 U.S. 481, 504, fn. 22 (1973). The court below *implied* disestablishment of the reservation perhaps in the mistaken notion that this Court called for that result in *DeCoteau.*

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[20]For example, Act of August 20, 1964, 78 Stat. 560, Mellette county (1910 Act) "tracts * * * on the Rosebud Sioux Reservation"; Act of March 3, 1909, c. 263, 35 Stat. 781, 809-810, Gregory county (1904 Act) land "on the Rosebud * * * Reservation."

At this writing, both Houses of Congress passed and cleared for the White House, S. 1327, as amended, transferring to 17 tribes title to "submarginal" lands owned by the United States. The bills as passed recite that "all the right, title, and interest of the United States * * * is hereby declared to be held by the United States in trust for such tribe, and * * * *shall be a part of the reservation.*" (emphasis supplied.) Rosebud is one of the 17 tribes and another 7 are tribes with surplus land statutes listed in App. D, p. 129. Part of the land transferred to the Rosebud Tribe is located in Mellette County deemed "a part of the reservation." S. Rept. 94-377, 94th Cong., 1st sess. (1975); 121 Cong. Rec. S16279-80 (September 19, 1975); H. Rept. 94-480, 94th Cong., 1st sess. (1975); 121 Cong. Rec. H9635-9 (October 6, 1975); 121 Cong. Rec. S17685 (October 7, 1975).

The court of appeals approached the case and examined the materials from the viewpoint of the non-Indian who incorrectly represented that the Indians had no use for the land, did not know how to use it, and were better off without it. The same materials contain repeated statements that the legislation would help the Indian by making the white man his neighbor, from whom he could learn.[21] *Mattz v. Arnett, supra,* 412 U.S. at p. 497. *Seymour v. Superintendent,* 368 U.S. 351, 356 (1962). The court of appeals makes no reference to these.

The court deemed relevant the unsupported 1975 assertion in respondents' brief below that the area "was settled and developed by non-Indians in partial reliance upon the removal of their lands from the exterior bounds of the reservation." (App. A, p. 3.) The court treats the reservation area as if it were uninhabited country awaiting the arrival of the hardy pioneer. Nowhere in the court's opinion is mention made of the number of Indians on the reservation, or the number of allotments on the land affected by the surplus land statutes. (See pp. 7, 9, 13, *supra*.) On the other hand, early in the opinion the court makes a point of reciting that 90% of the 1970 population "in the disputed area is non-Indian". App. A, p. 3.) In so doing, the court distorted this irrelevant fact because it melded the population of all three counties, although each county is covered by a separate act of Congress (only three-fourths of Gregory county is affected). Surely, 1970 population has no bearing on the

[21]H. Rept. 443, 58th Cong., 2d sess., p. 3 (1904) R. App. II, p. 136: Will" "bring the Indians into contact with their white brothers, and give them the benefit of learning how to farm and raise stock from actual observation, and it will tend to make them more self-supporting * * *." Similar language is found in 45 Cong. Rec. 5457 (April 27, 1910). R. App. III, p. 347.

1904, 1907 and 1910 intent of Congress. Further, the number of non-Indians has no relevancy. The Tribe's jurisdiction is limited to Indians on the reservation. Finally, if population figures are to be used, even as coloring, then the court of appeals should have shown that according to the 1970 census, 34% of the Mellette county (1910 Act) population is Indian.[22]

Given the limitations of this petition, we can but highlight some of the items of statutory language, either disregarded, or erroneously construed by the court below.

[22]*Census of the Population 1970, Characteristics of the Population, Part 43, South Dakota:*

County	*Non-Indians*	*Indians*	*Percent Indian*
Mellette	1591	822	34%
Tripp	7668	501	6%
Gregory*	6383	318	4.98%

*Only three-fourths of Gregory is in the reservation area. The population is for the full county.

The issue of current population figures was not raised in either court below and those figures first appeared in court of appeals opinion. The Tribe regards the 1970 Federal census as grossly inaccurate as to reservation Indians and if current Indian population had been an issue in the case, proof of its inaccuracy would have been made. The 1970 census was by mail. A substantial number of reservation Indians simply did not or could not complete and return what to them was a complicated return. The non-Indian census enumerators were not interested in searching out reservation Indians living in isolated areas to record them as Indians. Indians on the reservation are credited to the Tribe for measuring the allocation of funds from the Revenue Sharing Administration. This influences the local enumerators to report Indians as non-Indians so as to enlarge the population base of the State's political subdivisions within the reservation, for purposes of revenue sharing.

a. When the court of appeals read language of extinguishment and termination into the statutes, it paid no heed to the last section of each of the three Rosebud statutes, where Congress affirmatively declared (1) that the United States was not a purchaser, (2) that it was not guaranteeing to find purchasers, and (3) that it was "the intention of this act that the Uni ed States shall act as trustee for said Indians to dispose of the said lands, and to expend and pay over the proceeds received from the sale thereof only as received * * *." (For full text, see last sections of statutes in Appendices C-1, -2, -3, *infra.*) This language precludes any notion of termination. The court did not mention it.

b. All three Rosebud statutes directed that the proceeds from the sales of land be credited to the "Indians belonging and having tribal rights on the Rosebud Reservation." (App. C-1, sec. 3, p. 120; App. C-2, sec. 5, p. 122; App. C-3, sec. 7, p. 126.) If, as the court held, each statute terminated a portion of the reservation, the Indians in each disestablished portion no longer would be Indians belonging on the Rosebud reservation. This language cannot be reconciled with dissolution of the reservation. The court below ignored this statutory language.

c. Each of the three statutes provided that nothing in the Act should be construed to deprive "said Indians of the Rosebud Reservation, South Dakota, of any benefits to which they are entitled under existing treaties or agreements, not inconsistent with the provisions of this act." (App. C-1, sec. 1, Art. 5, p. 118; App. C-2 and C-3, pp. 123, 127, 1907 and 1910 Acts, last proviso). One of the 1868 Treaty benefits was a reservation for the "absolute and undisturbed use and occupation" of the Sioux. (See p. 3, *supra.*) This language fights the notion

that Congress simultaneously was terminating the reservation and renewing treaty promises to maintain the reservation. The court below ignored the "benefits" provision in the 1907 and 1910 Acts. As to the 1904 Act, the court stated that since the unratified 1901 "agreement" called for a cession, retaining reservation status would be inconsistent. (App. A, p. 15, fn. 21.) This answer has no validity. The 1901 "agreement" never took life. (See pp. 8-9, *supra.*)

d. The 1904 Act (sec. 2) and the 1910 Act (sec. 1) reserved land for agency, Indian school and religious purposes. (App. C-1, pp. 118-119; App. C-3, p. 124.) This is consistent with continuing the reservation status. The 1910 Act also reserved to the Tribe all land classified as timber. There is no reason to reserve timber land to a tribe on a terminated reservation. The court of appeals acknowledges the existence of the language but otherwise ignores it. (App. A, p. 47, fn. 101.)

e. Section 3 of the 1910 Act (App. C-3, p. 125) required the Tribe to make involuntary donations of up to 10 acres of tribal land for each townsite and 20% of the tribal proceeds from the sale of town lots for schools and public improvements in the towns. These charges against the Indians can be justified if the Indians shared in the benefits as enhancements to their reservation, but not if the reservation is dissolved. The court below is silent on the intent expressed by these forced donations of tribal land and money.

f. Each of the three Rosebud statutes contains language by which the United States acquired, without tribal consent, sections 16 and 36 for $2.50 per acre and explicitly granted those sections to the State. (App. C-1, sec. 4, p. 120; App. C-2, sec. 6, p. 123; App. C-3, sec. 8, p. 127.) Section 10 of the South Dakota Enabling Act

provided that the grant of sections 16 and 36 did not extend to "any lands embraced in Indian * * * reservations," until "the reservation shall have been extinguished and such lands be restored to and become part of the public domain."[23] (See App. A, pp. 28-29.) Because the three Rosebud statutes did not extinguish the reservation and place the land in the public domain, it was essential to insert in each of the statutes language explicitly donating sections 16 and 36 to the State, otherwise the State would not have received the school sections. *Minnesota v. Hitchcock,* 185 U.S. 373 (1902). The school section language speaks against a construction of extinguishment.

The court of appeals, however, contrary to the plain language and controlling law, deemed the language to be "premised solely upon an understanding that the reservation would be extinguished, and is persuasive that such is the effect of the Act." (App. A, pp. 28-31, 53, see p. 31 for the quotation).

g. Section 10 of the 1910 Act (App. C-3, p. 127) extended the Federal Indian liquor laws, prohibiting the introduction of intoxicants into Indian country, to all land in the Mellette county portion of the reservation for 25 years, the term of the trust patents issued to allottees. This was done to overcome a decision of this Court, in effect from 1905 to 1916, holding that an Indian who received a trust allotment became a citizen free of the

[23]This provision is not unique. The same language appears in the Enabling Act of the State of Washington involved in the case of *Seymour v. Superintendent,* 368 U.S. 351 (1962), and also in the Enabling Act of North Dakota involved in the Fort Berthold statute, which the court below held did not disestablish the reservation. *City of New Town, North Dakota v. United States,* 454 F.2d 121 (C.A. 8, 1972).

Indian liquor laws.[24] If section 10 had not been inserted, the protection of the Federal Indian liquor laws would not have covered allotted Indians while on land taken up by settlers. Such allottees would have been protected while on trust land because prior to 1948 (18 U.S.C. 1151), trust land was deemed Indian country, while fee land within an Indian reservation was not Indian country. *Clairmont v. United States,* 225 U.S. 551, 557-559 (1912); *Dick v. United States,* 208 U.S. 340, 359 (1908).

The district court, apparently unaware of the 1910 state of the law, reasoned that the presence of section 10 proved that the 1910 Act extinguished all Indian title, on the theory that otherwise there would be no need for section 10. (App. B, pp. 80-83, 90-92 in particular pp. 81-82.) The court of appeals, without pointing out the trial court's error, used comments made in the Congressional debates on the liquor issue as establishing the Congressional intent to dissolve the reservation status. (App. A, pp. 55-59.)[25] The court deemed "highly significant" (*idem.*, p. 59), statements made by members, other than the manager of the bill, reflecting a confused

[24]*Matter of Heff,* 197 U.S. 488 (1905), ignored in *Hallowell v. United States,* 221 U.S. 217 (1911), and expressly overruled in *United States v. Nice,* 241 U.S. 591 (1916); Cohen, Felix S., *Handbook of Federal Indian Law,* p. 175 (GPO 1945).

[25]The identical liquor provision appeared as section 13 of the Fort Berthold surplus land Act of June 1, 1910, c. 264, 36 Stat. 455, approved two days after the Rosebud 1910 Act. (App. D, Items 19, 20, p. 129.) The court below has held that the Fort Berthold act did not disestablish the reservation. *United States ex rel Condon v. Erickson,* 478 F.2d 684 (C.A. 8, 1973). By a 1909 amendment, the same language was added to the Flathead 1904 Act (App. D, Item 3, p. 129), Act of March 3, 1909, c. 263, 35 Stat. 781, 795; to the 1908 Fort Peck Act (App. D, Item 17), Act of March 3, 1909, *supra,* p. 796, and to the 1904 Yakima Act (App. D, Item 7), Act of May 6, 1910, c. 203, 36 Stat. 348.

understanding of Indian law. For example, members said "when the lands are sold there is no longer a reservation," or "if the lands are allotted it is no longer an Indian reservation" (*idem*, pp. 57, 58).

On the other hand, the court below quoted, but gave no weight to the answer of the manager of the bill, the committee chairman and member from South Dakota, who in the midst of the debate answered: "Yes, sir" when asked" * * * Mr. Chairman, this land, as I understand, is within the boundaries of an Indian reservation. Is that right?" (*Idem*, p. 58.)

h. Under section 2 of the 1907 Act (Tripp county) (App. C-2, p. 121), before the land was opened to settlers, the Secretary was authorized to allot 160 acres to each eligible Indian and to permit Indians already allotted to relinquish and receive an allotment anywhere "within the Rosebud Reservation." The committee reports explicitly stated that this latter provision included "the tract affected by this bill [Tripp county]." H. Rept. 7613, 59th Cong., 2d sess., p. 3 (1907); S. Rept. 6838, 59th Cong., 2d sess. (1907), adopting the House report. (R. App. III, pp. 277, 286.) An intent to terminate the reservation status of Tripp county land can hardly be reconciled with an explicit provision for allotments anywhere on the reservation, expressly including the land in Tripp county.

The court below undertook to explain away the allotment provisions saying they were intended to take care of only those 80 or so Indians who had received worthless allotments elsewhere on the reservation. (App. A, pp. 42-44.) The court of appeals apparently overlooked those legislative materials that reject any such limitation to the broad statutory language.

Those materials show that in December 1906 McLaughlin discussed two allotment problems with the Indians. One concerned allotted Indians who had received "worthless allotments." Those are the 80 allotments the court below referred to in the quoted excerpt from McLaughlin's letter of instructions written before he met with the Indians. (App. A, pp. 42-43 and fn. 87.) At the council proceedings, the Indians asked not only that the 80 dissatisfied allottees be taken care of but also that before the Tripp county land was opened, all unallotted children receive allotments. McLaughlin answered (App. E, Item 6, p. 134):

> (Dec. 15, 1906) I can positively promise you that, in case we reach an agreement, it will provide for the allotment of lands to all children born since March 3, 1899, and they may be allotted in Tripp County and before the lands are opened.
>
> * * * * *
>
> You ask that those entitled to allotments, but have not yet taken them, be allotted, of which there are about 80 in all. In answer to that I will say there will be no difficulty in that. All beneficiaries of the reservation who have not yet received allotments can be allotted before Tripp County is opened to settlement, and they can take them anywhere on the reservation, including Tripp County. There will be a provision in the agreement to that effect.

Section 2 of the 1904 Act carried out McLaughlin's promises. Of the 1,083,680 acres in Tripp county, over 37% (406,081 acres) were still in trust allotments as of June 30, 1925. (App. E, Item 26, pp. 142-143). The court of appeals' 80-allotment explanation simply does not hold.

The court below placed great stock on phrases such as the sale would "leave your reservation a compact, and

almost square," "diminished reservation," "nice, square reservation" and the like. (See phrases collected in the opinion, App. A, p. 26.) All of these phrases originated with McLaughlin, not the Indians. They originated mainly in the pre-1904 Act negotiations when the parties were talking in terms of an outright sale and cession for a sum certain with the land to be placed in the public domain and disposed of under the public land laws. (App. A, pp. 12-14.)

When such phrases were used in committee reports or debates, it was in the context of the erroneous understanding that the land was being ceded, and the mistaken belief that the Indians had agreed to the sale or disposition of the land. (e.g., 1904 Act, App. A, p. 33,—"land that is proposed to be *ceded* by this bill; *idem*, p. 39—the bill "is in line with the recent bills * * * affecting the *sale* of the Indian reservations," also p. 40; 1907 Act, 41 Cong. Rec. 3104, February 16, 1907, R. App. III, p. 284, "The Indians * * * have agreed to the disposition of it [reservation] under the terms of the bill. They will have left, * * * a reservation that is substantially 50 miles square" (Only the latter sentence was quoted below (App. A, p. 41), omitting the misrepresentation of consent.); 1910 Act, App. A, p. 49, "The Indians themselves agreed to the provisions of this bill * * *."

The word "reservation" is used in the materials as descriptive, or as synonymous with land opened to settlers. The word was not used in the sense of terminating the reservation status from the standpoint of a tribe's sovereignty over its own people, or altering the political allegiance of reservation Indians (e.g., App. A, pp. 51-52, quoting the House report on the 1910 Act).

Statutes must be tested by their language and the legal effect of the language. This the court of appeals failed to do. The decision below turns on their heads the principles governing the construction of Indian statutes.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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October, 1975